PUBLICATION

It Ain't Over 'Till It's Over – First Circuit Rejects Settlement Agreements Between Providers and Intermediary and Upholds Cost Report Reopenings [Ober|Kaler]

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On October 27, 2016, a three-judge panel for the United States Court of Appeals for the First Circuit issued an opinion concluding that a Medicare fiscal intermediary (Intermediary) does not have the authority to enter into a settlement agreement with a provider, and that the Secretary of the Department of Health and Human Services (Secretary) may reopen the cost reports at issue and recoup additional payments despite such settlement agreements.

In *Maine Medical Center v. Burwell*, No. 15-2483 (1st Cir. Oct. 27, 2016), the court was tasked with resolving a dispute between eight Maine hospitals (Hospitals) and the Secretary involving disproportionate share hospital (DSH) payments for fiscal years dating back to 1993. This dispute centers on a 1997 administrative cost report settlement that one of the plaintiff Hospitals entered into with its Intermediary, which required the Intermediary to include non-Supplemental Security Income (SSI) type 6 days in its DSH payment calculations. Following this settlement and subsequent agreements with other hospitals, the Intermediary told all Maine hospitals to include these days in their cost reports going forward – until it changed its mind in 2003, and reopened cost reports to reassess the DSH payments and recouped about $22 million.

The Hospitals challenged the Intermediary's action before the Provider Reimbursement Review Board (PRRB), which concluded many of the notices of reopening were "ineffectual" because they were issued more than three years after the notices of program reimbursement (NPRs) or were otherwise defective, and ordered the Intermediary to reimburse the Hospitals approximately $17 million. The Secretary reviewed and reversed the PRRB's decision and the Hospitals sought judicial review. Upon judicial review, the district court (and magistrate judge) agreed that some of the notices were "fatally flawed" and held that the settlement agreements barred the Intermediary from reopening certain cost reports.

After concluding the court had jurisdiction over the case, the First Circuit conducted a de novo review of the district court's judgment and addressed the Secretary's and Hospitals' appeals.

First, the Secretary argued that the Hospitals received valid notices of reopening even though the notices did not comply with the Medicare Provider Reimbursement Manual (PRM), because the notices complied with the minimum standards outlined in the regulations. The court agreed with the Secretary, noting that the "regulation controlled," and that the PRM is "nothing more than an interpretative guide" and therefore does not have the "force of the law." Additionally, the Hospitals argued that the mandatory reopening requirements were not satisfied, because there was no documentation that CMS instructed the Intermediary to reopen the cost reports. The court concluded that CMS "orally and informally" did instruct the Intermediary and, regardless, the Intermediary had permissive authority to reopen the cost reports.

Second, the Secretary argued the settlement agreements were not a barrier to the cost report reopenings because "the regulations make pellucid that an intermediary lacks authority to make payments that are not authorized by Medicare." Since the Secretary was not a party to the settlement agreements, and the Intermediary lacked authority to enter into the settlement (despite representing that it had such authority), the court concluded that the settlement agreements did not bar the reopening.

The Hospitals additionally argued that even if the notices of reopening were valid, the non-SSI type 6 days were properly included in the DSH calculations. However, the Secretary interpreted the applicable DSH calculations to exclude patients entitled to both Medicare Part A and Medicaid but not entitled to SSI, so the court deferred to the Secretary's interpretation under Chevron.

Finally, the Hospitals argued that even if the DSH calculations were incorrect, they should be held harmless from any obligation to repay the overpayments based on a Program Memorandum from the Secretary stating that intermediaries should not recoup "the portion of the Medicare DSH adjustment payments previously made to hospitals attributable to the erroneous inclusion of general assistance or other State-only health program, charity care, Medicaid DSH, and/or ineligible waiver or demonstration population days in the Medicaid days factor used in the Medicare DSH formula." However, the court agreed with the Secretary's contention that this provision did not extend to the obligation to refund DSH overpayments based on non-SSI type 6 days.

The First Circuit thus held that the Secretary properly reopened the cost reports and rejected the Hospitals' defenses to repayment.

Ober|Kaler's Comments

Maine Medical has made two things clear. First, when the PRM and regulations conflict, courts will often discount the PRM if necessary to support the Secretary. This is so even where the Secretary otherwise holds providers accountable for following the PRM. Second, a fiscal intermediary does not have the authority to make payments inconsistent with the Secretary's interpretation of the statute. Therefore, the Secretary retains the authority to ignore settlement agreements that the providers and their Intermediaries (now Medicare Administrative Contractors) have entered into in good faith. For those providers with similar settlement agreements, be aware that the intermediary may still reopen the cost reports if within the permissible reopening period.